90-1099

No. _____

In the
Supreme Court of the United States
October Term, 1990

STATE OF MINNESOTA,
Respondent,

v.

GARY LEE SCHWARTZMAN,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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QUESTION PRESENTED

Did the searches conducted by private security personnel at the entrance to Brainerd International Raceway constitute public police action governed by Fourth Amendment Limitations?

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TABLE OF AUTHORITIES

OTHER AUTHORITIES:

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

The Petitioner, Gary Lee Schwartzman, petitions for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Minnesota in this case.

PARTIES TO THE PROCEEDING BELOW

State of Minnesota

Gary Lee Schwartzman

Dale Jay Schmidt

Jeffrey Scott Buswell

OPINIONS BELOW

The Order of the Supreme Court of the State of Minnesota denying the State of Minnesota's Petition for Rehearing (Appendix p. A-37) was filed October 9, 1990.

The Opinion of the Supreme Court of the State of Minnesota reversing the Minnesota Court of Appeals' decision and reinstating the trial court judgment of conviction (Appendix p. A-1) was filed August 31, 1990. (4-3 decision).

The Opinion of the Minnesota Court of Appeals reversing the trial court judgment of conviction and remanding the case for further consideration (Appendix p. A-17) was filed December 26, 1989. (2-1 decision).

The Findings of Fact, Conclusions of Law and Order for Judgment by the trial court finding Petitioner Schwartzman guilty (Appendix p. A-28) was filed March 9, 1989.

The Omnibus Hearing Order by the trial court denying petitioner Schwartzman's Motion to Suppress Evidence (Appendix p. A-31) was filed December 27, 1988.

JURISDICTION

The Order of the Supreme Court of the State of Minnesota denying the State of Minnesota's Petition for Rehearing was filed October 9, 1990. The Opinion of the Supreme Court of the State of Minnesota reversing the Minnesota Court of Appeals decision and reinstating the trial court judgment of conviction was filed August 31, 1990. Jurisdiction of this honorable Court is invoked under 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

STATEMENT OF THE CASE

Petitioner Gary Lee Schwartzman was found guilty in a court trial submitted on stipulated facts. He was convicted of the offense of Possession of a Controlled Substance in violation of Minnesota Statutes Sections 152.09, Subd.1(2) and 152.15, Subd. 2(2). The central issue before the trial court and before the State appellate courts in this case has been whether the searches conducted by private security personnel at the entrance to Brainerd International Raceway in Minnesota constituted public police action, thereby making the searches subject to the search and seizure limitations set forth in the Fourth Amendment to the United States Constitution.

The question presented in this case, as set forth above, has been raised by Petitioner Schwartzman at each and every stage of the proceedings. At the trial court level, Petitioner Schwartzman filed a Demand for Omnibus Hearing which specifically included Petitioner Schwartzman's Motion to Suppress Any and All Physical Evidence. (Appendix p. A-38). Petitioner Schwartzman supported his Motion to Suppress with a detailed Memorandum. (Appendix p. A-39). At the Omnibus Hearing held on October 3, 1988, the County Attorney acknowledged that the central issue before the trial court was the validity of the searches:

> The common denominator of these cases is whether the, the question is whether these searches are constitutional.

(Omnibus Hearing Transcript p. 5).

In addition, Petitioner Schwartzman's counsel at the Omnibus Hearing specifically raised (and later argued) the issue of the legality of the searches which took place:

> Well, specifically I made a motion to have the Omnibus Hearing suppressing our concern over the legality of the search that took place on August 18 in that we feel that the search was illegal. Specifically it violated the Fourth Amendment.

(Omnibus Hearing Transcript p. 7-8).

In an Omnibus Hearing Order filed December 27, 1988, the trial court ordered, "[t]he Motion of Defendant regarding the suppression of evidence seized from the Defendant's vehicle is in all things denied." (Appendix p. A-31).

Petitioner Schwartzman appealed his conviction to the Minnesota Court of Appeals. Petitioner Schwartzman specifically raised the issue of the trial court denial of his Motion to Suppress Evidence on constitutional grounds. (Appendix p. A-17).

The Minnesota Court of Appeals reversed the Petitoner's conviction and remanded the case back to the trial court.

The State of Minnesota appealed. The same issue taken up at trial and at the Minnesota Court of Appeals was before the Supreme Court of the State of Minnesota on appeal. The Supreme Court of the State of Minnesota ultimately reversed the decision of the Minnesota Court of Appeals and reinstated the trial court judgment of conviction. (Appendix p. A-1). This appeal followed.

The facts material to the consideration of the question presented are as follows. In the early morning of August 18, 1988, Petitioner Gary Schwartzman and a friend, Jeffrey Buswell, left their homes in Minneapolis, Minnesota in their converted Greyhound Bus. They drove to Brainerd International Raceway (BIR) to observe the weekend races. They arrived at the gate of BIR at approximately 11:15 a.m. and were ordered out of their bus (and weekend quarters) by an armed, uniformed person whom they later learned was Bruce Gately, an employee of North Country Security. Gately entered the bus and proceeded to search it for contraband. Gately went into a closet in the bus. Concealed in a drawer he found a box containing a roach clip, a mirror, cigarette papers, a razor blade, white particles and small amount of marijuana.

Petitioner Schwartzman and his friend Buswell were handcuffed to a chain-linked fence while Gately continued to search the bus. Later the men were taken into custody by officers of the Crow Wing County Sheriff's Department. While in custody, a small amount of cocaine, approximately

a quarter of a gram, was found on Schwartzman. In addition, the bus was seized without a warrant by Minnesota Bureau of Criminal Apprehension agents, and more contraband was found.

The search at issue was conducted by a private security guard employed by North Country Security. North Country Security is owned by Keith Emerson, a City of Brainerd police officer and a special deputy for the Crow Wing County Sheriff's Office.

The search procedure followed by security guard Gately on the morning of the Petitioner's arrest had actually been determined in May of 1988, at a meeting between Crow Wing County Sheriff Frank Ball, Chief Deputy Erv Tollefson, Minnesota Bureau of Criminal Apprehension area supervisor Bruce Preece, and Officer Keith Emerson, the owner of North Country Security. It was agreed that if any circumstances were encountered by the Security Guards which seemed to justify an arrest, Officer Emerson would be called first. Then he would decide whether to call in other law enforcement officers. Arrangements were made for Officer Emerson to contact Dave Bjerja, a Crow Wing County Deputy Sheriff and a special Bureau of Criminal Apprehension Agent, when someone was held for further police action.

At approximately 6:00 a.m. on the day of the search, Officer Emerson convened a meeting with his employees to discuss security arrangements for the weekend's races. At the meeting, Officer Emerson told his employees that vehicles were to be searched for non-paying persons. In addition, there was a standing rule that vehicles were to be checked on a random basis for contraband.

There is overwhelming evidence in this case showing that the search which took place was a public search governed by the Constitutional prohibitions against unreasonable and warrantless searches and that the evidence obtained was illegally seized and should have been suppressed by the trial court. The decision by the Minnesota Supreme Court on the federal constitutional question raised is in conflict with decisions by the federal

appellate courts. Furthermore, the Minnesota Supreme Court has decided an important question of federal law which has not been, but should be, finally settled by this Court.

It is well-settled under the Fourth Amendment to the United States Constitution that searches conducted without a warrant are *per se* unreasonable, subject to a few well-delineated exceptions. *Welsh v. Wisconsin,* 466 U.S. 465 (1984); *State v. Hanley,* 363 N.W.2d 735 (Minn. 1985). The Fourth Amendment is applicable to the states through the Fourteenth Amendment. *Mapp v. Ohio,* 367 U.S. 643 (1961). It is also well-established that the Fourth Amendment applies only to governmental action. *Burdeau v. McDowell,* 256 U.S. 465 (1921). In some circumstances, however, a "private" party may violate another's Fourth Amendment rights by conducting an unreasonable search. *United States v. Walther,* 652 F.2d 788 (9th Cir. 1981); *United States v. Harvey,* 540 F.2d 1345 (8th Cir. 1976); *State v. Miggler,* 419 N.W.2d 81 (Minn. 1988). Searches conducted by private parties must comply with the Fourth Amendment when a government official in some manner investigates or encourages the search. *United States v. Issod,* 370 F.Supp. 1110 (E.D. Wisc. 1974). *See generally* 1 W. LaFave, *Search and Seizure,* Sec. 1.8(e) at 211, n. 151 (where pre-search contact between a private party conducting the search and a potentially interested government official is shown, influence may be inferred).

Factors to be considered in determining whether a private person's search implicates the Fourth Amendment include whether the government knew of and acquiesced in the intrusive conduct, whether the purpose for conducting the search was to assist law enforcement efforts, *United States v. Feffer,* 831 F.2d 734 (7th Cir. 1987), and whether the private entity engaged in the activity to further its own ends or purposes. *State v. Rogers,* 435 N.W.2d 275 (Wis. 1988). The determination is made on a case-by-case basis. *United States v. Walther,* 652 F.2d 788 (9th Cir. 1981).

It is a well-settled principal that "conduct that is formally 'private' may become so entwined with governmental

policies or so impregnated with a governmental character as to become to subject to constitutional limitations placed upon state action." *Evans v. Newton,* 382 U.S. 296, 299 (1966). Indeed, "when private individuals or groups are endowed by the state with powers or functions which are governmental in nature, they become agencies or instruments of the state and are subject to its constitutional limitations." *Id.* at 299. In this same regard, the Supreme Court of the United States has said that the Fourth Amendment applies if a private person, "in light of all the circumstances of the case, must be regarded as an 'instrument' or agent of the state . . . ." *Coolidge v. New Hampshire* 403 U.S. 443, 487 (1971).

The Minnesota Court of Appeals, in its opinion reversing the decision of the trial court, noted that it is difficult to determine when governmental action occurs. *State v. Buswell,* 449 N.W.2d 471 (Minn.App. 1989). *See also Evans v. Newton,* 382 U.S. 296, 299 (1966). The *Buswell* Court also observed that there is no single authority directly bearing on this issue. *Buswell,* 499 N.W.2d at 473. Furthermore, the Court stated that the public-private classification is to be made with an awareness that the Constitutional rights of the citizen must be protected and that Constitutional provisions which provide for the security of person and property are to be liberally construed. *Id.* at 473, *citing Coolidge v. New Hampshire,* 403. U.S. 443 (1971).

The facts in the present case show that the government involvement in the search of Petitioner Schwartzman's bus was significant and that the trial court should have ordered suppression of the illegally obtained evidence. The government not only had knowledge that searches of this type were taking place, but the search at issue was both directed and authorized by *police officer* Emerson. The contact between police officer Emerson and security officer Gately (who conducted the search of Petitioner's bus) was not merely incidental, indirect, or short-term. The Ninth Circuit has counseled that the nature of the relationship between the government and private party is significant:

> The government must be involved directly as a participant or indirectly as an encourager of the private citizen's actions before we deem the citizen to be an instrument of the state.

United States v. Walther, 652 F.2d 788, 791 (9th Cir. 1981).

In this case, police officer Emerson specifically directed Gately to search every vehicle entering the gates of the raceway. Indeed, Officer Emerson told Gately to look not only for suspected trespassers, but also to search for contraband and illicit drugs as well. Additional evidence supporting the public nature of the security guard activities is seen in the meeting which was conducted prior to the search between Crow Wing County authorities, a Bureau of Criminial Apprehension special agent, and Officer Emerson. At that meeting, these governmental officials established procedures to be followed when contraband was found during searches of vehicles at the raceway. This official participation by Crow Wing County Authorities, the Bureau of Criminial Apprehension, and police officer Emerson in the planning and implementation of the overall security operation clearly taints the acts of security officer Gately with state action. It is also clear that the scope of the search was greatly expanded from one designed solely to protect the raceway's legitimate business needs. Simply denying admittance to the race track would have fulfilled this need. The search of Schwartzman's bus was clearly designed to facilitate the law enforcement goals of government officers and aid in the public prosecution of offenses discovered. Moreover, police officer Emerson's so-called private actions cannot be divorced from his official position of authority as a law enforcement officer. He has been a licensed police officer for fourteen years and is a special deputy for Crow Wing County. As a police officer, Officer Emerson should not be allowed to escape the prohibitions of the Fourth Amendment merely by directing a third party to perform a search or seizure which would be improper if he conducted it himself. *See United States v. West*, 453 F.2d 1351 (3rd Cir. 1972). Simply put, police officials should not be allowed to

circumvent the Fourth Amendment under the operational guise of a private security force.

The evidence seized in the unlawful search of Petitioner Schwartzman's bus must be suppressed. *See Wong Sun v. United States*, 371 U.S. 471 (1963). Suppression in this case will deter police officers in the future from setting up private police organizations and conducting wide-spread warrantless searches, not based on probable cause, such as the one Officer Emerson directed in this case. The deterrent purpose of the exclusionary rule would be furthered by suppression of the evidence seized in this case, and the frightening specter which searches such as the instant one beckon would be quelled:

> If private security guards are permitted to ignore the Fourth Amendment proscriptions, reliance on private security personnel rather than law enforcement officials will be encouraged and unconstitutional searches will increase. Such a result is untenable.

United States v. Dansberry, 500 F.Supp. 140 (N.D. Ill. 1980).

REASONS FOR GRANTING THE WRIT

In this case the Minnesota Supreme Court has decided a federal question in a way that conflicts with various federal appellate decisions. In *United States v. Feffer*, 831 F.2d 734 (7th Cir. 1987), the Seventh Circuit stated that factors which determine whether a search by a private person implicates the Fourth Amendment include whether the government knew of and acquiesced in the intrusive conduct, and whether the purpose for conducting the search was to assist law enforcement efforts. The facts in this case clearly show that the government both knew of and acquiesced in the intrusive conduct which took place and that the purpose for conducting the search by the private security company was to assist law enforcement efforts. Hence, Fourth Amendment

protections pertain to this case and the Minnesota Supreme Court decision to the contrary should be reversed.

The decision by the Minnesota Supreme Court also conflicts with a decision by the Eighth Circuit. In *United States v. Luciow*, 518 F.2d 298 (8th Cir. 1975), the Court refused to find government involvement in a search of a residence by a private person because the Court found that there was no evidence that the government directed, authorized, or knew of an illegal entry by the private citizen. *Id.* at 300. This holding by the *Luciow* Court suggests that the Eighth Circuit intends a private search to be a public search when the government either knows of the search, authorizes the search, or directs the search. The facts in the instant case show that the government knew of the searches which took place, authorized the searches which took place and, indeed, directed the searches. Hence, the Minnesota Supreme Court decision to the contrary should be reversed.

The Minnesota Supreme Court's decision is also in conflict with a decision by the Ninth Circuit. In *United States v. Walther*, 652 F.2d 788 (9th Cir. 1981), the Court suppressed illegally obtained evidence, holding that a so-called "private search" by a common carrier, conducted with the intent to aid law enforcement authorities and with their knowledge, violated the Fourth Amendment. In *Walther*, an airline employee seized an overnight case, opened it, and found drugs. The employee then contacted agents from the Drug Enforcement Agency (DEA) who later arrested the defendant. The airline employee had conducted similar searches in the past and had reported suspicious findings to the DEA. The prior contact with the DEA satisfied the *Walther* Court that the government had acquiesced in the search. Further, the Court found that the employee intended to aid law enforcement by searching the overnight case. As a result, the Court held the search unreasonable and suppressed the evidence. Here, the evidence shows that the "private" security officer had prior contact with government officials, that the government officials acquiesced in the search, and that the intent was to aid law enforcement by searching Schwartzman's bus.

Hence, the decision by the Minnesota Supreme Court in this case is in conflict with the decision in *Walther* and should be reversed.

A final important reason why this Petition should be granted is that the Minnesota Supreme Court has decided an important question of federal law which has not been, but should be, finally settled by this Court. The question presented was a question of first impression in the State of Minnesota, and, although this Court has set forth general pronouncements on the subject, *see e.g., Coolidge v. New Hampshire,* 430 U.S. 443 (1971); *Evans v. Newton*, 382 U.S. 296 (1966), this Court has not settled the precise question presented in this case.

For the reasons set forth above, Certiorari should be granted in this case.

Respectfully Submitted,

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APPENDIX

State of Minnesota

In Supreme Court

C5-89-555
CX-89-1166
C5-89-1169

Court of Appeals

Kelley, J.
Dissenting, Yetka, Wahl, Keith, JJ.

State of Minnesota, petitioner,
Appellant,
vs.

Filed: August 31, 1990
Office of Appellate Courts

Jeffrey Scott Buswell,
Respondent,
Gary Leek Schwartzman,
Respondent,
Dale Jay Schmidt,
Respondent.

SYLLABUS

The trial court's finding that the actions of an employee of a private security agency who searched vehicles and seized contraband which was later delivered to law enforement officials, who used it as evidence in a criminal case against the vehicles' occupants, was not governmental action triggering the exclusionary rule under the Fourth Amendment bar against unreasonable searches and seizures was not clearly erroneous.

Reversed and trial court judgment reinstated.

Heard, considered and decided by the court en banc.

OPINION

KELLEY, Justice.

Resolution of this case requires that we examine the extent to which searches of motor vehicles that turn up contraband seized by private security guards, who later turn the contraband over to government authorities for use in criminal prosecutions, constitute governmental actions subject to the limitations on unreasonable search and seizure of the Fourth Amendment to the United States Constitution. In denying the respondents' motions to suppress the contraband seized by private security guards, the trial court ruled that, on the facts of these cases, the search and seizure of the contraband was the product of a private search and, therefore, not subject to Fourth Amendment constraints against unreasonable searches and seizures. The court of appeals disagreed. It held that there was sufficient governmental involvement in the search to transform it into government action, and remanded the case to the trial court for determination of whether the searches were reasonable. *State v. Buswell*, 449 N.W.2d 471 (Minn. App. 1989).

Because the determination of whether sufficient governmental involvement exists to transform a private search into governmental action is a question of fact to be determined by the trial court, *United States v. Koenig*, 856 F.2d 843, 847 (7th Cir. 1988); *United States v. Walther*, 652 F.2d 788, 791 (9th Cir. 1981), and because we are unable to conclude that the trial court's holding that each of the searches here was private was clearly erroneous, we reverse the court of appeals, reinstate the trial court's orders refusing to suppress the evidence, and affirm the convictions of these respondents.

The Brainerd International Raceway (BIR) operates an automobile racetrack on private property approximately six miles outside the City of Brainerd in Crow Wing County, Minnesota. The BIR was not within the jurisdiction of the City of Brainerd. In 1988 BIR contracted for security services at the track during the summer racing season with

a company called North Country Security. Keith Emerson, whose primary employment was as a member of the City of Brainerd police force, owned and operated North Country Security. At the time, all City of Brainerd police officers, including Emerson, held appointments as special deputies for Crow Wing County. However, none of the Brainerd police officers, including Emerson, had independent powers of arrest outside the city limits of Brainerd except as directed by the Crow Wing County Sheriff or by a regularly deputized sheriff.

In 1988 North Country Security's contract with BIR called for North Country Security to be paid a set figure for security on a given weekend. In return, it was North Country Security's Responsibility to hire guards and manage all security arrangements at the track during a race meet. The weekend commencing August 18, 1988, was the largest weekend of that year's racing season; approximately 78,000 persons attended the raceway between Thursday and Sunday. North Country Security employed 127 guards, only six or seven of whom were licensed police officers employed in any governmental jurisdiction, to provide security during this meet. None of the off-duty police officers employed that weekend were from law enforcement agencies having any jurisdiction covering the Brainerd International Raceway.

In May 1988, before the commencement of BIR's 1988 racing season, Emerson had conferred in general terms with the Crow Wing County Sheriff and the local Minnesota Bureau of Criminal Apprehension agent relative to procedures to be employed for making arrests should security guards of North Country Security uncover illegal activity during a race meet. This conference resulted in agreement that if any incident encountered by North Country Security guards seemed to warrant an arrest for a crime, Emerson would first be notified, and, he, in turn, would decide whether to call in official law enforcement agencies. The arrangement was strictly procedural. No agreement was made relating to the type or number of searches by security personnel, nor were any official law

enforcement personnel assigned to be present at the BIR during a race meet. However, if Emerson decided to report discovered criminal activity, a specific deputy or agent was "on call" to respond to the report.

Part of the responsibility of North Country Security on a race weekend was to see that only ticket holders entered the raceway grounds. North Country Security attempted to discharge that duty generally, and specifically on the weekend of August 18, 1988, by randomly stopping and searching vehicles seeking entry to the raceway to look for "stowaways."

After the gates were opened on August 18, 1988, a number of vehicles, including those operated by these respondents, were searched by security guards before being permitted to enter the grounds. The primary motivation for the searches was to insure that persons without admission tickets not enter the track; a secondary reason was to prevent illegal drugs from entering the premises, and to keep other contraband such as mopeds and fireworks out of the race track grounds.[1] No written warning was given to entrants that their vehicles might be searched for "stowaways" or illegal drugs, firecrackers or other prohibited items. However, Emerson had established a policy for North Country Security employees that before a search took place, occupants of vehicles were to be provided an option to refuse to consent to a search and not enter the track premises.

Security guard Bruce Gateley, who was not an off-duty public officer licensed or employed as a law enforcement officer in any jurisdiction, actually conducted the searches

[1] Crowd and patron conduct is difficult to control during a race of this magnitude, involving tens of thousands of patrons and extending over several days. In authorizing searches for illegal drugs, mopeds and fireworks, BIR hoped to minimize incidents that might result in damage to patrons or property. Although not specifically involving illegal drugs, fireworks, or small motorized vehicles, the "flavor" of the type of conduct some patrons engage in after overuse of mood altering substances (there alcohol), thereby endangering not only themselves, but, as well, other patrons, is presented in *Rieger v. Zackoski*, 321 N.W.2d 16 (Minn. 1982). *See also State v. Borden*, 455 N.W.2d 482 (Minn. App. 1990).

of the vehicles occupied by the respondents. At the time of the search of each vehicle he was wearing North Country Security standard uniform and was carrying a sidearm and handcuffs. Before making each search, however, contrary to the policy established by Emerson, Gateley failed to secure consent to the search or inform the occupants of the option to refuse.

On August 18, 1988, his procedure was to inform the occupants of each vehicle that the purpose of a search was to spot "stowaways," after which he proceeded to search the inside of the vehicle. This procedure was followed when he searched Respondent Schmidt's pick-up camper. After entering the camper, Gateley found no "stowaways," but did open a small closet in which a fishing tackel box which contained what appeared to be cocaine was located. Thereupon Gateley handcuffed Schmidt to a fence, and contacted Emerson, who himself notified law enforcement officers pursuant to the protocol previously established in May of 1988.

Using the same procedure, Gateley later stopped and searched a converted Greyhound bus occupied by Respondents Buswell and Schwartzman. While searching the bus for nonpaying persons, Gateley found cocaine, marijuana, and other drug paraphernalia in one of the closets. Both Schwartzman and Buswell were likewise handcuffed to the fence, and Emerson was again contacted so he could inform law enforcement officials of the situation.

The law enforcement official notified by Emerson was Crow Wing County Deputy Sheriff Bjerga, who, with other officers, responded by going to the race track. After further investigation they arrested all three respondents and charged them with possession of controlled substances.

After the trial court had denied the respondents' motions to suppress the drugs seized in the search, the parties by agreement submitted the cases to the trial court on stipulated facts. The respondents were adjudged to be guilty and subsequently sentenced. This appeal followed.

The limited issue presented by this appeal is whether the trial court's ruling that the searches were not governmental

actions subject to the constraints of the Fourth Amendment to the United States Constitution was clearly erroneous.

Before addressing that issue, however, we deem it appropriate to note and briefly discuss a related but nondeterminative issue; to wit, whether the conduct of Gateley, had he been a governmental law enforcement official at the time, would have violated the "unreasonable searches and seizures" clause of the Fourth Amendment, thereby rendering the contraband seized subject to suppression. We have not the slightest doubt that these searches, which can charitably be characterized as being "outrageous," would violate the Fourth Amendment and result in suppression had they been made by one exercising governmental action. *See, Mapp v. Ohio,* 367 U.S. 643, 655 (1961); *see also State v. Mitchell,* 172 N.W.2d 66, 73 (Minn 1969) (marijuana seized by police subsequent to a warrantless, unconstitutional search of an entire house was suppressed). Indeed, the state concedes that if the searches by Gateley constituted state action, the Fourth Amendment rights of these respondents were violated.[2]

However, no matter how egregious the conduct of Gateley in making these searches, the contraband was properly admitted into evidence if, at the time, he enjoyed the status of a private citizen. The Fourth Amendment was intended as a restraint upon the activities of the government. It was

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[2]Originally the state took the position (1) that each respondent had consented to the search made, and (2) that Gateley found the illegal contraband in plain view during each search. Both arguments were patently meritless — and the latter was absolutely opprobrious. The evidence revealed that under the guise of looking for "stowaways," Gateley opened a small closet of Schmidt's camper and saw a closed fishing tackle box which, when opened, contained the drugs found. Similarly, during a search of a small closet in the bus, Gateley found drugs and drug paraphernalia. It would have been obvious to anyone that neither closet (or the tackle box) could hide a "stowaway," moped, or any other sizable items that the BIR had an interest in excluding from the track premises. Later, at oral argument the state altered its position, and conceded that if the searches constituted state action, suppression of the contraband would have been proper under the exclusionary rules.

never intended to be a limitation upon other than governmental agencies. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). Thus, a private search, even if unreasonable, will not result in evidence seized being suppressed because there is not constitutional violation. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *United States v. Pryba*, 502 F.2d 391, 397-398, n. 39, 40, 42 (D.C. Cir. 1974).[3]

However, the mere fact that a private individual made the search and seized the contraband does not alway isolate his or her conduct from Fourth Amendment scrutiny. If, "in the light of all the circumstances of the case" the private individual "must be regarded has having acted as an instrument or agent of the state" when conducting the search, the search is subject to Fourth Amendment constraints. *Skinner v. Railway Executives Ass'n*, ___ U.S. ___, 109 S. Ct. 1402, 1411 (1989); *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). The determination of whether the private person acted as an agent of the state is one of fact to be decided on a case-by-case basis after consideration of all the facts and circumstances relative to the search. *Skinner v. United States*, ___ U.S. at ___, 109 S. Ct. at 1411; *United States v. Koenig*, 856 F.2d 843 (7th Cir. 1988); *United States v. Walther*, 652 F.2d 788, 791 (9th Cir. 1981). "Whether a private party should be deemed an agent or instrument of the government for Fourth Amendment purposes necessarily turns on the degree of the government's participation in the private party's activities." *Skinner*, ___ U.S. at ___, 109 S. Ct. at 1411.

Federal courts have considered a variety of factors to

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[3]Our analysis today is limited to the public-private search dichotomy which, as indicated in the cases cited in the body of the opinion, arises from the Fourth Amendment to the United States Constitution. We do not reach the issue of whether this search violated Art. I, § 10 of the Minnesota Constitution. That issue has neither been raised nor discussed on appeal, and at the trial court level, at least one respondent failed to move that the evidence be suppressed under the Minnesota Constutition. We note, however, that Art. I, § 10 of the Minnesota Constitution like its federal counterpart, the Fourth Amendment, purports to constrain only unreasonable searches by governmental authority.

determine whether government participation recasts the private individual as an instrument or agent of the state. In *United States v. Walther*, 652 F.2d 788 (9th Cir. 1981), the Ninth Circuit stressed two "critical factors": (1) whether the government knew of an acquiesced in the search and (2) whether the search was conducted to assist law enforcement efforts or to further the private party's own ends. *Walther*, 652 F.2d at 792. Other circuits have adopted the *Walther* critical factor analysis either in whole or in part. *See, e.g., United States v. Pierce*, 893 F.2d 669, 673 (5th Cir. 1990); *Pleasant v. Lovell*, 876 F.2d 787, 797 (10th Cir. 1989); *United States v. Feffer*, 831 F.2d 734, 739 (7th Cir. 1987).[4]

These *Walther* criteria, as well as criteria suggested by other cases, are helpful in that they direct the trial court to focus on the significance and impact of the government's involvement in the search. The concern is whether the conduct of the government was such as to make the actions of a private individual the government's actions for the purpose of a Fourth Amendment analysis. Although the criteria set forth in *Walther* are helpful, the diversity in factual settings involving private searches mandates an individual case-by-case analysis in which precedent plays but a small part. As previously noted, final determination of whether the governmental search subject to the constraints of the Fourth Amendment is a question of fact to be resolved by the trial court. Moreover, such factual determinations will be reversed only if clearly erroneous. *United States v. Walther*, 652 F.2d 788 (1981) (dictum); *United States v. Botero*, 589 F.2d 430, 433 (9th Cir. 1978), *cert. denied* 441 U.S. 944 (1979); *United States v. Koenig*, 856 F.2d 843, 849 (7th Cir. 1987); *United States v. Feffer*, 831 F.2d 734 (7th Cir.

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[4] In *United States v. Luciow*, 518 F.2d 298 (8th Cir. 1975), the Eighth Circuit seemingly stressed a different factor, to wit, that before a private individual's action can be attributed to the government, some degree of government instigation of the search must be shown. *Id.* at 300 (*citing United States v. Valen*, 479 F.2d 467 (3rd Cir. 1973), *cert. denied* 419 U.S. 901 (1974)). *See also United States v. Coleman*, 628 F.2d 961, 965 (6th Cir. 1980) (police did not *instigate*, encourage, or participate in search).

1986).

Respondents advance several arguments in support of their contention that Gateley and North Country Security were acting as instruments or agents of the state when the searches and seizures were made. We examine these arguments keeping in mind the two factor *Walther* test and watching for clear indices of significant government action. First, respondents contend that the May meeting between Emerson and Crow Wing County law enforcement officials at which arrest procedures were formulated indicates that the state knew of, ordered, encouraged, and acquiesced in the vehicle searches by North County Security guards, and, therefore, the guards were instruments or agents of the government. In advancing this argument, respondents rely, in part, upon *Walther,* 652 F.2d 788, where the court concluded that an airline employee who had seized an overnight case, found drugs upon opening it, and then contacted narcotic agents from the Drug Enforcement Agency, who then arrested the owner, was an instrument of the government. There, unlike the cases before us today, the airline employee had been a paid Drug Enforcement Agency informant to at least five years before the search and expected compensation for the search there at issue.

Contrasted to *Walther*, the facts surrounding the searches here differ dramatically. The records in these cases contain nothing to indicate that law enforcement officials did anything to persuade North Country Security employeess to conduct searches in any particular manner, or to search for any particular items.[5] Law enforcement personnel did know that searches for stowaways would occur at entry gates. But, nothing in the record indicates that law

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[5]The dissent suggests that at the May meeting Emerson and law enforcement officials "discussed the search and seizure of controlled substances at the gate of BIR." Dissent at D-2. This is somewhat misleading as nothing in the record indicates that searches and seizures of controlled substances at the main gate were specifically discussed. Rather, the group determined that for any incident, not only those dealing with controlled substances, Emerson would be the sole contact with both the Crow Wing County Sheriff's Office and the BCA.

enforcement officials knew the searches would violate BIR policy and be conducted without first obtaining the consent of the vehicle occupants. Furthermore, not only is the record devoid of evidence that law enforcement officials were aware of or encouraged the specific searches in question, but apparently, similar searches resulting in an arrest had not occured during the 1988 racing season. The record contains not one reference to any search which occurred between the May meeting and the August 18, 1988 race at which Gateley, or any other officer searched for, found, or turned over contraband to law enforcement officials, or any evidence that he received, or even expected, compensation for so doing. In short, unlike *Walther*, there is no indication that Gateley or North County Security conducted the searches with the government's objectives in mind. The government in no way "knew of" or "acquiesced in" the search. *Walther*, 652 F.2d at 792.

Mere antecedent contact between law enforcement and a private party is inadequate to trigger the application of the exclusionary remedy under the Fourth Amendment. *United States v. Colemen*, 628 F.2d 961, 965 (6th Cir. 1980). It is only when the government takes some type of initiative or steps to promote the search, that a private citizen is deemed to be an agent or instrument of the government. *Pleasant v. Lovell*, 876 F.2d 787, 796-97 (10th Cir. 1989). But when the extent of governmental involvement amounts to no more than responding to requests for arrests and discussions concerning arrest procedure, the Fourth Amendment exclusionary sanctions are not triggered. *See, e.g., United States v. Koenig*, 856 F.2d 843 (7th Cir. 1988); *United States v. Ramirez*, 810 F.2d 1338 (5th Cir.) *cert. denied*, 484 U.S. 844 (1987); *State v. Sanders*, 185 N.J. Super. 258, 448 A.2d 481 (App. Div. 1982); *United States v. Capra*, 372 F. Supp. 609 (S.D.N.Y. 1974).

Respondents next focus upon the status of Emerson, whose primary employment was as a City of Brainerd police officer. They suggest that the government cannot avoid the constraints of the Fourth Amendment by directing a third party to perform an illegal search. *See, e.g., United*

States v. West, 453 F.2d 1351, 1356 (3rd Cir. 1972). This argument fails for two reasons. First, Emerson was not acting as a government agent; his duties at the BIR were not those of a government law enforcement agent. At the BIR he had only the power to make a citizen's arrest because he was outside the jurisdiction in which he had any authority as a licensed public officer. The two jobs were distinctly separated. *See, e.g., United States v. McGreevy*, 652 F.2d 849 ((th Cir. 1981); *Commonwealth v. Leone*, 383 Mass. 329, 334-36, 435 N.E.2d 1036, 1048-41 (1982).

Furthermore, nothing in the records of these cases suggests that Emerson directed a third party, the security guards, to conduct searches without first asking consent of the vehicle occupants, or to exceed the scope of that consent given, or to look for contraband outside the area in plain view. To the contrary, the evidence indicates Emerson's policy was to ask vehicle occupants if guards could conduct a search, inform the occupants of the scope of the search, and inform the occupants that if the search was refused, the search would not be conducted and the vehicle occupants would be prevented from entering the raceway. In other words, no evidence points to Emerson as the original instigator of the searches. The evidence seems clear that it was the race track management who requested vehicle searches for nonpaying attenders, and for other items that might be used to disrupt the raceway weekend program. These facts support the trial court's implicit findings that there was no sigificant government involvement in these searches.

That being so, we could end our analysis at this point. However, we proceed to examine the trial court's findings that the searches were conducted by private persons and were for private rather than governmental purposes. This leads us to consider the second *Walther* factor – an analysis of the purpose of the search to see if the trial court's conclusion that it was private has support in the evidence, keeping in mind that searches conducted for private purposes which turn up evidence of crime do not turn into state action merely because that evidence is later turned

over to law enforcement officials. *United States v. Bulgier*, 618 F.2d 472 (7th Cir. 1980). The trial court found legitimate private purposes for the search. Without doubt there exists evidence to support that conclusion. The BIR primarily sought to prevent people from entering the raceway without first paying admission. Additionally, the BIR had legititmate private reasons to prevent illegal drugs, mopeds, and fireworks from entering the raceway in order to minimize disruptive behavior of patrons, to prevent injury to or discomfort of other patrons, and to reduce the possibility of destruction to property.

Accordingly, we are unable to conclude that the trial court arrived at a clearly erroneous finding when it found that the searches and seizures in this case were private and, thus, not subject to Fourth Amendment constraints.[6] Clearly, evidence existed to support that result. Therefore, we reverse the decision of the court of appeals, and the judgment of the trial court is reinstated.

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[6] As did the court of appeals, we express our concern that egregarious searches by private security guards escape the penalty of suppression, whereas similar conduct by licensed law enforcement officers would not. We take notice that private security guards often possess professional police knowledge and skill, and may conduct searches with the goal of obtaining evidence of a crime. *See, e.g., State v. Keyser*, 117 N.H. 45, 47, 369 A.2d 224, 225 (1977). The court of appeals in its opinion addressed this concern by determining that private security guards may be subject to Fourth Amendment constraints when they regularly engage in the "public function" of law enforcement. *State v. Buswell*, 449 N.W.2d at 475. *See also People v. Holloway*, 82 Mich. App. 629, 635, 267 N.W.2d 454, 459-60 (Kaufman, J. concurring). It offends our sense of rationality and proportionality that a person who performs acts similar to a law enforcement official is able to circumvent the constraints of the fourth amendment merely because the private sector pays the bill. But, we cannot ignore the clear line of precedents starting with *Burdeau v. McDowell* which hold that the fourth amendment only gives protection against unlawful government actions.

YETKA, Justice (dissenting).

Because the security agents here worked as instruments or agents of the state and thus were governed by the fourth amendment's prohibition against unreasonable searches and seizures, I dissent.

The fourth amendment applies to searches and seizures effected by a private party acting "as an instrument or agent of the Government." *Skinner v. Railway Labor Executives Ass'n*, ___ U.S. ___, 109 S. Ct. 1402, 1411 (1989). The degree of government participation in the private party's activities sufficient to make the private party its instrument or agent is a question to be resolved "in light of all the circumstances." *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). According to the Supreme Court, the fact that the government did not compel a private party to perform a search does not, by itself, establish that the search is a private one. *Skinner*, 109 S. Ct. at 1411. Rather, fourth amendment protection can apply where the government had done "more than adopt a passive position toward the underlying private conduct." *Id.*

In *Skinner*, federal regulations authorized, but did not compel, a private railroad to test employees to detect drug and alcohol use. The court found that, by removing legal barriers to testing, pre-empting collective bargaining agreements prohibiting testing, and indicating a strong preference for testing and a desire to share in the fruits of these intrusions, the government encouraged, endorsed and participated in the testing so as to implicate the fourth amendment. *Id.* at 1412.

Although there is no evidence that the county law enforcement officials compelled North Country Security to search vehicles, as in *Skinner*, they clearly adopted more than a passive position towards this conduct. At their meeting before the race season opened, Emerson - the owner and operator or North Country Security - and county law enforcement officials discussed the search and seizure of controlled substances at the gate of BIR. They agreed, Emerson testified, that, if in the process of searching vehicles for stowaways the security guards found

contraband, the guards would contact Emerson, who would then call the county officials. They also agreed that the guards would hold persons possessing contraband until county officials arrived. An official was on call to make arrests if Emerson called. In short, the law enforcement officials here, like the government in *Skinner*, knew that private parties would be conducting searches and raised no legal barriers to these searches or to the prospect of private security guards forcibly holding people at the race track. Indeed, the county officials planned to use the fruits of those searches.

In *Skinner*, the Court discusses as a threshold matter whether the government endorsed searches and, after concluding that the fourth amendment applied, analyzed the validity of those searches. *Skinner*, 109 S. Ct. at 1411-22. The Court did not require the defendants to establish, as the majority suggests the defendants should here, that the government encouraged a particular manner of or objectives for searching people, nor does the Supreme Court require the government to provide incentives to private actors in order to implicate the fourth amendment. Establishing that the county officials knew that there would be security personnel at BIR searching vehicles and detaining people until they arrived is evidence that county officials acquiesced in the searches. This is official state action. Accordingly, I would hold that the security company here acted as an agent of the state and that defendants are entitled to the protection of the fourth amendment.

This same result follows from applying the test set out in *United States v. Walther*, 652 F.2d 788 (9th Cir. 1981), and adopted by the majority. Majority Op. at 8. Under this test, courts determine if a private party acts as an agent of the government by considering (1) whether the government knew of an acquiesced in the search and (2) whether the search was conducted to assist law enforcement efforts or to further the private party's own ends. *Id.* at 792. As discussed above, the government knew of and acquiesced in the searches here. Further, the searches in this case were not merely conducted to further BIR's own ends: denying

admittance to the race track would fulfill this need. Rather, detaining people found with contraband according to an established plan reveals that the security guards conducted the searches to assist law enforcement efforts. Certainly assisting law enforcement is a commendable practice, but, in this case, it should be exercised within the restraints of the Constitution.

Emerson's status as an experienced police officer and special deputy for the Crow Wing County Sheriff's Department is not essential to finding state action. This fact does, however, lend additional weight to finding state involvement here. Emerson instructed Gately, a North Country security guard, to search every vehicle entering BIR during a 2-hour period the morning of the race. He was close enough to see Gately search defendants' vehicle and handcuff the defendants to a fence. Emerson's close contact with law enforcement officials as an employee raises the concern that his security agents, under his direction, conducted police work and circumvented the Constitution under the guise of private security work. Even though, as the majority notes, Emerson only had the power to make a citizen's arrest at the BIR, searches effected pursuant to that authority are not immune to fourth amendment scrutiny. *See State v. Schinzing*, 342 N.W.2d 105, 108-11 (Minn. 1983); *State v. Filipi*, 297 N.W.2d 275, 277-79 (Minn. 1980).

Significant policy considerations underlie this issue. I agree with the Supreme Court of California that "searches by private security forces can involve a particularly serious threat to privacy." *People v. Zelinski*, 24 Cal. 2d 357, 365, 155 Cal. Rptr. 575, 579, 594 P.2d 1000, 1004 (1979). First, it seems to me incongruous to give private individuals who do not receive the equivalent training of official police forces broader authority to make searches and seizures than police officials themselves. Second, here, the security guards were clad in a police-like uniform, including a hat, badge, shoulder patches and belt with flashlight. Gately also carried handcuffs and a sidearm. The security guards looked like and were acting like law enforcement officials.

Private investigators and security guards who regularly engage in the "public function" of law enforcement should be subject to fourth amendment constraints. *See Marsh v. Alabama*, 326 U.S. 501 (1946) (company-owned town acting in a public function subject to first amendment constraints); 1 W. LaFave, *Search and Seizure* § 1.8(d) at 200 (2d ed. 1987).

In general, it is important to note that the Constitution itself would not have been ratified if the original drafters had not promised to write the Bill of Rights. The colonists took the language in our Bill of Rights from a 700-year history of English law and were determined to put in writing fundamental rights upon which the government cannot infringe. They did not intend to leave these fundamental rights to chance, interpretation or an unwritten constitution such as the British still have. I am concerned that the majority opinion effectively waters down the Bill of Rights, a process that should be done by amending the Constitution itself, not by judicial interpretation.

As the majority acknowledges, the action taken by the security agents in searching the vehicles would undoubtedly violate the fourth amendment to the United States Constitution if performed by law enforcement officials. Majority Op. at 6-7. Because I would find that North Country Security acted as an agent of Crow County law enforcement officials, I would affirm the court of appeals.

WAHL, Justice (dissenting).

I join the dissent of Justice Yetka.

KEITH, Justice (dissenting).

I join the dissent of Justice Yetka.

STATE of Minnesota, Respondent,

v.

Jeffrey Scott BUSWELL,
Appellant, (C5-89-555)

Gary Lee Schwartzman,
Appellant, (CX-89-1166)

Dale Jay Schmidt,
Appellant, (C5-89-1169).

Nos. C5-89-555, CX-89-1166
and C5-89-1169.

Court of Appeals of Minnesota.

Dec. 26, 1989

Review Granted Feb. 21, 1990.

Defendants were charged with possession of controlled substances. The District Court, Crow Wing County, Clinton W. Wyant, J., denied suppression motion, and appeal was taken. The Court of Appeals, Crippen, J., held that private security guard's search of persons attempting to enter racetrack was sufficiently public to warrant constitutional scrutiny.

Reversed and remanded.

Bowen, J. dissented and filed opinion.

Syllabus by the Court

When considering whether random search and seizure activity of security company employees is public or private, we must liberally construe constitutional provisions for the security of persons and property. Factors affecting a conclusion of public policing activity include (1) official police involvement; (2) service of public policing function; (3) boundaries of reasonable private policing; and (4) use of police personnel.

Heard, considered and decided by PARKER, P.J., and CRIPPEN and BOWEN,* JJ.

OPINION

CRIPPEN, Judge.

Appellants contend their fourth amendment rights were violated by security agent searches at the gateway to Brainerd International Raceway. The trial court concluded the policing activity was private. We reverse and remand.

FACTS

Each appellant was charged with possession of controlled substances. After a consolidated omnibus hearing, the trial court determined that the evidence seized was the product of a private search and denied appellants' motions to suppress the evidence. Appellants waived their rights to a jury trial and were found guilty as charged by the trial court.

Appellant Dale Jay Schmidt was stopped in his borrowed pickup camper by Bruce Gately, a private security agency employee outside the entrance to Brainerd International Raceway on August 18, 1988. Gately asked Schmidt to unlock the back door of the camper portion of his vehicle so Gately could see if any persons were attempting to enter the race without paying the admission fee. After Schmidt unlocked the back door, Gately looked into the rear of the camper, entered it, opened a closet and discovered a small, green tackle box which contained cocaine. Gately then handcuffed Schmidt and his passenger to a fence pending the arrival of law enforcement officials.

Appellants Jeffrey Scott Buswell and Gary Lee Schwartzman were also stopped by Gately upon their arrival at the racetrack on August 18. While searching their converted bus, Gately discovered contraband inside a closet and closet drawer. Subsequently, Buswell and Schwartzman were handcuffed to a fence and law enforcement officials were summoned. More contraband was found after the bus was seized and searched, and cocaine was discovered on appellants after they were taken into custody.

In each instance, the searches were conducted by a private security guard employed by North Country Security. North Country Security is owned by Keith Emerson, a

Brainerd police officer and a special deputy for the Crow Wing County Sheriff's office.

Emerson contracted with the Brainerd raceway to provide security at the track, which is located on private property about six miles outside Brainerd, in Crow Wing County. He was responsible for hiring security guards and managing the security arrangements. For the weekend at issue, Emerson employed 127 guards, seven of whom were police officers.

In May of 1988, prior to the racing season, Emerson conferred with the Crow Wing County Sheriff and a local Bureau of Criminal Apprehension agent to determine the procedures that would be employed when his security guards seized contraband or uncovered other illegal activity. It was agreed that if any circumstances encountered by Brainerd security guards seemed to warrant an arrest, Emerson would be called first. After reviewing the situation, he would then decide whether to call in law enforcement officers. Arrangements were made for Emerson to contact Dave Bjerja, a Crow Wing County deputy sheriff and a special BCA agent, when someone was held for further police action.

At approximately 6:00 a.m. on the day of the searches, Emerson convened a meeting with his employees to discuss security arrangements for the weekend's races. At this meeting, Emerson told his employees that vehicles were to be searched for non-paying persons. Emerson testified, however, that there was also a standing rule that vehicles are checked on a random basis for contraband.

ISSUE

Did the searches conducted by private security personnel at the entrance to Brainerd International Raceway constitute public police action, governed by fourth amendment limitations?

ANALYSIS

Appellants contend the random searches at issue were not private activity and should have been subject to the contraints set forth by the fourth and fourteenth amendments. They argue that there was sufficient evidence of public action to implicate the constitutional prohibitions against unreasonable and warrantless searches and that evidence obtained was illegally seized and should have been suppressed.

It is well-settled that the fourth amendment applies only to governmental action. *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S.Ct. 574, 576, 65 L.Ed. 1048 (1921). This rule of law has been followed in Minnesota. *See State v. Kumpula*, 355 N.W.2d 697, 701 (Minn.1984); *State v. Hodges*, 287 N.W.2d N.W.2d 413, 416 (Minn.1979). The difficulty often arises, however, as it does here, in determining when governmental action occurs. There is no single authority directly bearing on this issue.

The public-private classification is made with awareness that constitutional rights of the citizen must be protected. We are to liberally construe those constitutional provisions which provide for the security of person and property. *See Coolidge v. New Hampshire*, 403 U.S. 443, 453-54, 91 S.Ct. 2022, 2031-32, 29 L.Ed.2d 564 (1971). Courts have recognized the dangers in creating a simplistic division between private and public sectors when interpreting the fourth amendment.

> To err on the side of a restrictive interpretation of the Fourth Amendment would be to sanction the possibility of widespread abuse of the privacy rights of individuals by private security guards.
>
> * * * * * *
>
> Ill-trained in the subtleties of the law of search and seizure, private security guards are more likely than public law enforcement officials to conduct illegal searches and seizures. In addition, private security guards have accoutrements of office that tend to

> radiate an air of authority not possessed by other private individuals. Of particular importance are the uniform and badge, both regulated by the state.

People v. Hollway, 82 Mich.App. 629, 634, 267 N.W.2d 454, 459 (1978) (Kaufman, Judge, concurring).

The Supreme Court formulated the following standard in *Coolidge:*

> The test * * * is whether [the private citizen], in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the state * * *.

Coolidge, 403 U.S. at 487, 91 S.Ct. at 2049. The Court recently reiterated this position and stated that the fourth amendment does not apply to a private search or seizure *unless* the private party acted as an instrument or agent of the government. *Skinner v. Railway Labor Executives Ass'n*, ___ U.S. ___, ___, 109 S.Ct. 1402, 1411, 103 L.Ed.2d 639 (1989).

Case law indentifies several determinants of public involvement. Our consideration of these factors leads us to the conclusion that the searches in the present case were public. As these factors are examined here, we review the record with respect for the additional rule of law that appellants have the burden to show by a preponderance of evidence that the security searches here were not private in nature. *United States v. Feffer*, 831 F.2d 734, 739 (7th Cir.1987).

1. *Official Police Involvement.*

Whether a private party should be considered an agent or instrument of the government for purposes of the fourth amendment turns initially on the degree of the government's participation in the private party's activities. *Skinner*, ___ U.S. at ___, 109 S.Ct. at 1411. "The fact that the government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one." *Id.* Governmental participation may be found where the government does something more than adopt a passive position toward underlying private conduct. *Id.*

Before a private party's actions can be attributed to the government, some degree of government instigation must be shown. *United States v. Luciow*, 518 F.2d 298, 300 (8th Cir.1975). This may be in the form of governmental direction, authorization, or knowledge of the illegality. *Id.* The fourth amendment may apply if the government participates in a search or encourages a private party to conduct a search. *Gundlach v. Janing*, 536 F.2d 754, 755 (8th Cir.1976).

A search is not private in nature if it has been ordered or requested by a government official. 1 W. LaFave, Search and Seizure § 1.8(b), at 178 (2d ed. 1987). Similarly, governmental involvement has been found to exist when private security guards act pursuant to customary procedures agreed to in advance by the police. *See Murray v. Wal-Mart, Inc.*, 874 F.2d 555, 559 (8th Cir.1989); *El Fundi v. Deroche*, 625 F.2d 195, 196 (8th Cir.1980).

In the instant case, a meeting occurred where public officials and private security personnel reached an understanding regarding arrest procedures to be utilized upon the discovery of contraband by the private guards. Although this meeting dealt with the aftermath of seaches, and not the manner of searching, the meeting produced a standing arrangement for contacts by the supervising security agent with police during the hours of operation, and a police officer was designated on call to assist with arrests. Emerson testified he was to be the intermediary between the security person conducting the search and the police; as he explained: "They wanted a law enforcement officer making the phone calls which would be for two reasons. One, I am in charge of security and I am a licensed officer."

2. *Service of Public Policing Function.*

Regardless of direct police involvement, systematic use of random contraband searches serves the general public interest and may reflect pursuit of criminal convictions as well as protection of private interests. *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946), supplies the basis for concluding that private investigators and police may be subject to the fourth amendment where they are

with some regularity engaged in the "public function" of law enforcement. *Id.* at 506, 66 S.Ct. at 278. *See* 1 W. LaFave, § 1.8(d) at 200. *See also Feffer,* 831 F.2d at 739 (private purpose to assist police considered along with government acquiescence in conduct).

Private security guards may share with police an interest in public prosecutions premised on the results of a private search. Here, as already pointed out, the interest of police was demonstrated in the prior meetings between Emerson and law enforcement officials regarding the procedures to be used. Where some pre-search contact between the private party conducting the search and a potentially interested government official is shown, influence may be inferred. 1 W. LaFave, § 1.8(e) at 211 n. 151. The security guards were clearly aiming at discovery of contraband and public prosecution of offenses thus discovered. This was so notwithstanding any private interest in controlling the drug-induced misconduct. Emerson testified that vehicles were to be checked on a random basis for contraband.

In addition, private security personnel were utilized here to police a major public activity. Private security guards have been increasingly used as supplements for police protection and perform functions similar to licensed police officers. Here, Emerson employed approximately 127 guards, seven of whom were police officers, for the weekend races at the Brainerd raceway overseeing approximately 78,000 spectators.

Finally, the police-like clothing, equipment, and procedures gave North Country Security personnel the appearance of public authorities. *See Holloway*, 82 Mich.App. at 634-35, 267 N.W.2d at 459-60. They wore grey uniforms with badges. Gately carried handcuffs and a gun. Emerson acknowledged that the security guards might look like police officers to the average person. Combined with the use of the police arrest process (handcuffing appellants to fences, conducting body searches), the role of these private security agents extended to a police function, not merely affording private protection.

3. *Boundaries of Reasonable Private Policing.*

When intrusion goes beyond a reasonable and legitimate means for protecting private property, the practice suggests a need for constitutional protection of individual liberty. *Commonwealth v. Leone*, 386 Mass. 329, 334, 435 N.E.2d 1036, 1041 (1982). The public does not reasonably anticipate, we conclude, a private prerogative for random searches, a regular part of admission to a public event, which are more intrusive than permitted for police authorities. We have examined, in this regard, the nature of the intrusion in the circumstances of this case.

Gately's searches of appellants' vehicles were evidently conducted without consent. Appellants were not given the option of being searched or leaving the raceway. Moreover, Gately exceeded the announced scope of the searches. Although appellants were told that he was only looking for persons trying to enter the race without paying, Gately searched areas of appellants' vehicles which could not possibly have hidden a person. He also testified that the purpose of the searches was to look for contraband as well as trespassers.

4. *Police Personnel.*

Finally, the identity of private security employees as off-duty policemen is an additional factor to be weighed. *See Williams v. United States*, 341 U.S. 97, 99, 71 S.Ct. 576, 578, 95 L.Ed. 774 (1951) (special police officer who operated a detective agency acted under color of law, and not as a private person, when he used brutal methods to obtain confessions from alleged theives after being hired by a privately-owned company). Such officers are formally affiliated with the government and usually given authority beyond that of an ordinary citizen. Thus, they may be treated as state agents and subject to the constraints of the fourth amendment. *Leone*, 386 Mass. at 333, 435 N.E.2d at 1040 (comparing public and "purely private" searches).

Emerson, a long-time licensed police officers and special deputy, directed and authorized the searches and instructed security personnel. As a result, private actions became entwined with governmental policies. *See Evans v. Newton*,

382 U.S. 296, 299, 86 S.Ct. 486, 488, 15 L.Ed.2d 373 (1966). Emerson cannot escape fourth amendment limitations by directing a third party to perform a search he could not otherwise conduct himself. *See United States v. West*, 453 F.2d 1351, 1356 (3rd Cir.1972).

In sum, we observe a combination of factors requiring the conclusion that the activity of private security personnel in this case took on a public character. There was significant official police involvement as indicated by the pre-search meetings between Emerson and law enforcement officials. North Country Security agents were engaged in the "public function" of law enforcement. Emerson, as well as a number of the security agents, were licensed police officers. Finally, the searches involved a significant degree of intrusion.

DECISION

Because the trial court concluded the search was private, it did not address evidence and argument on the fourth amendment issue. On remand, the trial court must weight the issues for unreasonableness in the search activity, including consent for the scope of the search and the question of whether any contraband was found in the agent's plain view.

Reversed and remanded.

BOWEN, Judge (dissenting).

I respectfully dissent. The record before us and before the trial court does not support the majority's conclusion, even applying the majority's criteria, that the searches were public rather than private.

I agree with the majority that the test, enunciated in *Coolidge v. New Hampshire*, 403 U.S. 443, 487, 91 S.Ct. 2022, 2048, 28 L.Ed.2d 564 (1971), and most recently reiterated by the Supreme Court in *Skinner v. Railway Labor Executives Association*, ___ U.S. ___, ___, 109 S.Ct. 1402, 1411, 103 L.Ed. 2d 639 (1989), is whether the private citizen who conducted the search and seizure acted as an instrument or agent of the government. I part company

with the majority, however, on the issue of whether the application of their criteria, or any other criteria recognized by case law, establishes that either Gately or his boss, Emerson, acted here as an instrument or agent of Crow Wing County or the State of Minnesota.

The meeting between Emerson and law enforcement personnel, discussing procedures to be followed upon discovery of contraband, was not initiated by the BCA or by the county sheriff; rather, it was held to inform Emerson how to contact a law enforcement officer to take over after Emerson or one of his employees discovered contraband and made a citizen's arrest on the BIR property. The law enforcement personnel attending the meeting gave no instructions as to how searches or arrests were to be made. They did, however, insist that one individual, Emerson, call them in, rather than be subjected to the prospect of being called by any of 60 security guards. On the law enforcement side, one deputy sheriff, Dave Bjerga, was assigned as the individual to be called by Emerson. Bjerga, however, was not standing by awaiting calls, but went on performing his regular duties. (In fact, when he was called by Emerson about the searches and arrests here, he was on his way to Long Prairie on another case.) The meeting was the result of Emerson's legitimate concern, on behalf of his private employer, about the logistics of promptly turning over citizen's arrestees to a peace officer, both to comply with statutory requirements and to avoid liability for false arrest. The meeting did not constitute the government instigation or participation required to make these "public" searches. *See* 1 W. LaFave, Search and Seizure § 1.8(b), at 178 (2d ed.1987).

BIR has an obvious legitimate interest in avoiding open drug use or drug-induced behavior on its property, something which could jeopardize its continuation in businesses. BIR initiated entrance-gate vehichle searches to insure that no one entered without having paid for admission, as well as to keep order. The record is devoid of any evidence that BIR's primary purpose was the assistance of public authorities in the prosecution of persons for drug violations.

Admittedly, Gately's searches would not have passed fourth amendment muster had they been public searches. However, I can find no authority for assuming a nexus between the unreasonableness of a search and its public or private nature. The fact that Gately engaged in conduct forbidden to a police officer does not make his searches public.

Finally, the fact that seven of Emerson's 127 employees were moonlighting policemen from other jurisdictions does not bring this case within *Williams v. United States*, 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774 (1951). These security guards are not formally affiliated with the government and have no authority beyond that of an ordinary citizen. We cannot treat them as state agents on the record before us. In referring to Emerson as "a long-time licensed police officer and special deputy," the majority fails to note that Emerson was a Brainerd police officer, that the BIR is not located in the City of Brainerd, and that Emerson had no authority as a special deputy to make arrests. Neither Emerson nor Gately could lawfully conduct a search or make an arrest *except as a private citizen*. Nor did either of them hold himself out as a police officer in making the searches and arrests in question.

I find nothing in the majority's reasoning, or in this record, to convince me that Emerson's and Gately's conduct was government-instigated, or that the state or county participated therein. I believe the searches were private searches, not covered by the fourth amendment; I would affirm the judgments of conviction.

STATE OF MINNESOTA **IN DISTRICT COURT**

COUNTY OF CROW WING

NINTH JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

vs.

Gary Lee Schwartzman,
Defendant.

FINDINGS OF FACT
CONCLUSIONS OF LAW
ORDER FOR JUDGMENT

File No. K-88-477

The above-entitled proceeding came on for trial on February 24, 1989, before the Honorable Clinton W. Wyant, Judge of the above named court, at the Crow Wing County Courthouse, City of Brainerd, County of Crow Wing, and State of Minnesota.

Defendant appeared in person and by his attorney, Mr. Steven J. Meshbesher. The State of Minnesota appeared by Mr. Stephen C. Rathke, County Attorney.

After hearing all the evidence adduced at said trial, being fully advised in the premises and upon all the files and records herein, the court makes the following:

FINDINGS OF FACT

1. That on August 18, 1988, the defendant and his vehicle were searched upon entry to Brainerd International Raceway (BIR), which is in Crow Wing County.

2. The during that search by a BIR security guard substances suspected to controlled substances as defined in M.S. Sec.152.01 and Sec. 152.02 were discovered.

3. That the suspected substances were sent to the BCA laboratory for analysis. The lab report indentified the substances as follow:

A. 0.9 grams of powder containing cocaine.

B. 26.6 grams of marijuana.
C. 27.3 grams of marijuana.
D. 44.3 grams of a resinous extract from marijuana commonly know as "hashish".
E. 4 grams of powder containing cocaine.
F. 4.5 grams of marijuana.

4. That the defendant's possession of the controlled substances was not for a personal use authorized by law.

CONCLUSIONS OF LAW

1. The above items are controlled substances as defined in M.S. Sec. 152.01, subd. 2, subd. 4, subd. 9 and 152.02.

2. The controlled substances were in the possession of the defendant.

3. That such possession of controlled substances is in violation of M.S. Sec. 152.09, subd. 1(2).

4. That as a result, the defendant is guilty of the offense of Possession of a Controlled Substance in violation of M.S. Sec. 152.09, subd. 1(2) and 152.15, subd. 2(2).

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 6 day of March, 1989.

Clinton Wyant
JUDGE OF THE DISTRICT COURT

JUDGMENT

I HEREBY CERTIFY that the foregoing conclusions of law constitute the judgment and decree in the above entitled matter.

Dated at Brainerd, Minnesota, this 9th day of March, 1989.

Darrell M. Paske
Court Administrator
Crow Wing County, Minn.
BY: Lynn Holmes
Deputy

MEMORANDUM

This matter is before the court pursuant to a trial by the court to the stipulated facts contain on the record and in the court file. The defendant was in possession of a controlled substance in violation of M.S. Sec. 152.09, subd. 1(2) and 152.15, subd. 2(2). Consequently, the court finds the defendant guilty.

IT IS SO ORDERED.

C.W.W.

STATE OF MINNESOTA **IN DISTRICT COURT**

COUNTY OF CROW WING

NINTH JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,
vs.

OMNIBUS HEARING ORDER

Gary Lee Schwartzman,
Defendant.

File No. K-88-477

This matter was heard by the court on October 3, 1988, pursuant to a motion by defendant to suppress evidence seized during the search of the defendant's vehicle. Defendant appeared in person and by his attorney, Mr. Steven J. Meshbesher. The State of Minnesota appeared by Mr. Stephen C. Rathke, County Attorney. The undersigned, having heard the evidence adduced at the hearing and being duly advised in the premises, now makes the following

FINDINGS OF FACT

1. The evidence seized was the product of a private search outside the requirements of the Fourth Amendment necessitating a search warrant.

Based upon the foregoing Findings of Fact

IT IS ORDERED

A. The motion of defendant regarding the suppression of evidence seized from the Defendant's vehicle is in all things denied.

B. The attached memorandum shall be considered a part of this order.

Dated this 27 day of Dec., 1988.

Clinton W. Wyant
Judge of District Court

MEMORANDUM

This matter is before the court pursuant to defendant's motion to suppress evidence seized from a motor vehicle. The evidence was discovered in the vehicle while the vehicle was being searched upon entry to Brainerd International Raceway (BIR). The search was made in an effort to locate persons attempting to gain entry to BIR without paying admission. The search was made by a raceway security guard without a search warrant. Upon entry to the vehicle the security guard discovered controlled substances, subsequently detained the defendant and law enforcement officers were summoned.

It is undisputed that a search and a seizure conducted without a warrant is *per se* unreasonable under the Fourth and Fourteenth Amendments, unless the government conduct is justifiable under an established exception to the warrant requirement. *SEE Katz v. United States*, 389 U.S. 347, 357 (1967), *State v. Hanley*, 363 N.W.2d 735, 738 (Minn. 1985).

The State of Minnesota alleges that there was no search within the confines of Fourth Amendment protection. The state claims that the evidence seized was discovered by means of a warrantless search of a vehicle by a private security guard. As a consequence of the search being "private," the defendant is afforded no protection from unreasonable searches by the Fourth Amendment. Therefore, the Exclusionary Rule does not apply and the motion to suppress should be denied.

The State relies on the United States Supreme Court cases of *Burdeau v. McDowell*, 256 U.S. 465 (1921) and *United States v. Jacobsen*, 466 U.S. 109 (1984). The *Burdeau* cases holds that the Fourth Amendment applies only to Governmental conduct. *Id.* 256 U.S at 475. The *Jacobsen* case involved a package accidentally opened by private shipping personal, who upon discovery of the contents

alerted authorities accordingly. The Court reasoned that because the shipping personal discovered the evidence without any encouragement of law enforcement, nor at the request of law enforcement, there was no search in violation of the Fourth Amendment. *Id.* 466 U.S. at 113.

However, in *Jacobsen,* the Supreme Court never really dealt with the issue of private searches and potential limitations on such private searches by the Fourth Amendment. The court was primarily concerned with the scope of the search conducted by law enforcement subsequent to the "private search." *Id.* 466 U.S. at 115. The Court discussed the lessened expection of privacy in the damaged package after it had been inspected, and based its ruling on that point. *Id.* 466 U.S. at 119-120. The only guidance provided this court from *Burdeau* and *Jacobsen* is that the Fourth Amendment limits only searches conducted by the government, with hints that private searches with governmental involvement might trigger Fourth Amendment protections.

There is not dispositional authority on the issue of private searches as provided by the Minnesota Supreme Court or Court of Appeals decisions. It is clear that the *Burdeau* rule has been accepted as law in the State of Minnesota. *See State v. Hodges,* 287 N.W.2d 413 (Minn.1979), *State v. Kumpula,* 355 N.W.2d 697 (Minn.1984). However, the *Burdeau* rule may only be of value as a general concept applying Fourth Amendment scrutiny only to government conduct.

In *Hodges* the court was concerned with the issue of using information received as the result of a private search as the factual basis of a search warrant affidavit. *Id.* 287 N.W.2d at 416. The court concluded that is was acceptable to use such information as long as it met the requirements for reliability of the informant. *Id.* In coming to that conclusion, the court stated that the search by a private citizen was outside the protection of the Fourth Amendment. *Id.* (citing *Burdeau* with approval).

Again in *Kumpula*, the court relied on the *Burdeau* rule to

upholding the admission of evidence discovered by a private search, but questioned the admissibility of evidence discovered by law enforcement as a result a warrantless search that exceeded the scope of that private search. The court went on to hold that the defendant was not prejudiced by the admission of the evidence obtained when the scope of the private search was exceeded by the subsequent warrantless search by law enforcement for other reasons than that the evidence was the result of search in violation of the Fourth Amendment. *Id.* 355 N.W.2d at 701. However in dictum, the court inferred that there are possible exceptions to admissibility to evidence which is the fruit of a private search. *Id.* at 700. Unfortunately, the court did not define what private conduct coupled with government involvement would fall within Fourth Amendment scrutiny. The Court only hinted that is was possible to have evidence discovered by a private search suppressed when law enforcement might have some involvement. *Id.* at 700-701.

In *State v. Miggler*, 419 N.W.2d 81 (Minn.Ct.App..1988), the Court of Appeals was confronted with the admissibility of evidence which was the fruit of a private search. The focus of the court's attention was aimed at whether the subsequent warrantless search by the police was permissible, or whether that warrantless search was unreasonable because that search exceeded the scope of the private search. The court eventually held that the subsequent search by the police was in violation of the Fourth Amendment and upheld the trial court's decision to suppress the evidence. *Id.* at 83-85. The court in analyzing the issues presented, discussed the United Supreme Court's decision of *United States v. Jacobsen*, 466 U.S. 109 (1984). The court in distinguishing the facts before it from those facts in *Jacobsen* did not, however, hold that the *Jacobsen* rule actually applied in the State of Minnesota. *Miggler*, 419 N.W.2d at 84.

This court is confronted with a case of first impression. The only clear point of law is that only government conduct is subject to Fourth Amendment protection. *See Burdeau v. McDowell*, 256 U.S. 465 (1921), *United States v. Jacobsen*,

466 U.S. 109 (1984), *State v. Hodges, 87 N.W.2d 413 (Minn.1979), State v. Kumpula,* 355 N.W.2d 697 (Minn.1984). The court is faced with a difficult question. Was the search private, or was the conducted by the government? If the court determines the search to be private, the defendant's motion shall be denied. Alternatively, if the court determines the the search was governmental, the defendant's suppression motion shall be granted. It is undisputed that there is some governmental invovlement in the events that transpired. However, the court is convinced that the search was primarily private in nature.

The defendant concedes that the individual who conducted the search was a private citizen. The defendant claims on a variety of theories discussed in Defendant's Memorandum, that circumstances transformed a private search into a governmental search. The court is provided limited guidance given the lack of authority with regard to what conduct or involvement by the government accompanying a private search would offend the Fourth Amendment. There is case law from other jurisdictions that is helpful. However, this court is reluctant to rely upon the nonpersuasive authority from other jurisdictions.

The court is presented no Minnesota authority that the mere fact that the supervisor and proprietor of the security company that conducted the search is a police officer determines that the said search is governmental conduct. The court also is not provided with a guide as to how to measure the involvement by a law enforcement officer, that would cause a private search to fall within Fourth Amendment protection. Therefore, this court must conclude, that the searches were private in nature removing the conduct of the private security guard from Fourth Amendment protection. Consequently, the defendant's motion to the suppress the evidence seized as a result of the private searches by the security guard is in all things denied.

Any issue as to the accession of the scope of the

private search was not raised at Omnibus Hearing. No evidence relating to this issue was presented. Therefore, the court will not determine whether the subsequent warrantless searches by law enforcement personal exceeded the scope of the initial privates searches.

IT IS SO ORDERED.

C.W.W.

STATE OF MINNESOTA
IN SUPREME COURT

C5-89-555
CX-89-1166
C5-89-1169

State of Minnesota, petitioner,
Appellant,

vs.

Jeffrey Scott Buswell,
Respondent (C5-89-555),
Gary Lee Schwartzman,
Respondent (CX-89-1166),
Dale Jay Schmidt,
Respondent (C5-89-1169).

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that respondents' Petition for Rehearing be, and the same hereby is, denied in all respects.

Dated: October 8, 1990

BY THE COURT:

Peter S. Popovich, Chief Justice

STATE OF MINNESOTA **IN DISTRICT COURT**

COUNTY OF CROW WING

NINTH JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

vs.

DEMAND FOR OMNIBUS HEARING

Gary Lee Schwartzman,
Defendant.

TO: STATE OF MINNESOTA AND CHARLES P. STEINBAUER, ASSISTANT CROW WING COUNTY ATTORNEY, P.O. Box 411, Brainerd, MN 56401:

Pursuant to the Minnesota Rules of Criminal Procedure the defendant, Gary Lee Schwartzman, hereby demands an Omnibus Hearing in the above entitled matter, and will move the court as follows:

1. To suppress any and all statements taken in the nature of admissions or confessions.
2. To suppress any and all physical evidence.
3. To dismiss the complaint for lack of probable cause.

MESHBESHER, SINGER & SPENCE, LTD.

By .....
Steven J. Meshbesher
Attorneys for Defendant
Attorney No.: 127413
1616 Park Avenue
Minneapolis, MN 55404
(612) 339-9121

Dated: September 2, 1988

STATE OF MINNESOTA **IN DISTRICT COURT**

COUNTY OF CROW WING

NINTH JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

vs.

Gary Lee Schwartzman,
Defendant.

MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS AND IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR INSUFFICIENT EVIDENCE

This memorandum is submitted in support of both the defendant's motion to suppress all evidence derived from any stop, search or seizure and to dismiss the complaint for lack of probable cause. On October 3, 1988, the Court conducted an omnibus hearing. Stephen Rathke appeared for the State. Steven J. Meshbesher appeared for the defendant. The Court ordered that memoranda be submitted.

INTRODUCTION

The Court should suppress the evidence seized in the warrantless search of the defendant's bus on August 19, 1988. The search was conducted without a warrant and without probable cause pursuant to instructions of Keith Emerson of the Brainerd Police Department. As a result of Officer Emerson's involvement, the search was not a so-called "private" search as the State urges the Court to find. This search violated the defendant's rights to be free from unreasonable searches and seizures under the fourth amendment of the United States Constitution and article I, section 10, of the Minnesota Constitution.

In Summary, the State does not contend that Security

Guard Gateley had probable cause to search the bus, rather it premises the admissibility of the seized evidence on two other grounds: First, the search was conducted by a private party, and so the prohibitions against unreasonable searches and seizures do not apply; and second, the search was valid because the defendant voluntarily consented to it. The Court should reject these arguments and suppress the evidence seized because there was, enough police involvement to take the search out of the purely private category to implicate the fourth amendment and article I section 10 and because the defendant did not consent to the search.

FACTS

In the early morning of August 18, 1988, defendants Thomas Buswell and Gary Schwartzman left their homes in Minneapolis in their converted Greyhound bus. They drove to Brainerd International Racetrack (BIR) to observe the weekend races. When they arrived at the gate, the defendants were ordered out of their bus (and weekend quarters) by an armed, uniformed person, who they later learned was a person named Gateley who worked for North County Security. Gateley then conducted a warrantless search of the bus and the States seeks to use the fruits of this search and seizure in this prosecution.

North Country Security.

At 6:00 a.m. on August 18, 1988, Keith Emerson, a Brainerd police officer and owner of North Country Security, convened a meeting with his employees. Emerson is also a special deputized peace officer for all of Crow Wing County. Present at the meeting, was Ben Gateley, a captain at North Country Security, who had worked for Emerson for three and half hears. Emerson called the meeting to discuss the security arrangements North Country was providing BIR during the races.

At the meeting, Officer Emerson told his personnel to search every vehicle entering BIR that morning. Emerson told his men to search vehicles for persons attempting to

enter BIR without paying and also to search for contraband including illegal drugs.

Schwartzman and Buswell arrived at BIR at about 11:15 a.m. As they drove toward the front gate, Gateley approached the bus and told the two occupants to get out of the bus. Gateley then entered defendants' bus and proceeded to search it for contraband. In a cupboard, he found a box containing a mirror, cigarette papers, a razor blade and a small amount of marijuana.

The defendants were then handcuffed to a chain link fence while Gateley continued the search. Later, the defendants were taken into custody by officers from the Bureau of Criminal Apprehension. While in custody the BCA officers found a gram of cocaine on Buswell and 1/4 gram of cocaine on Schwartzman. Also, the bus was seized and searched without a warrant by BCA agents who found more contaband.

ARGUMENT

THE COURT SHOULD SUPPRESS THE EVIDENCE DERIVED FROM THE WARRANTLESS, NONCONSENSUAL SEARCH OF THE DEFENDANT'S BUS BECAUSE THERE WAS SUFFICIENT POLICE INVOLVEMENT TO IMPLICATE THE CONSTITUTIONAL PROHIBITIONS AGAINST UNREASONABLE SEARCHES AND THE SEARCH WAS CONDUCTED WITHOUT PROBABLE CAUSE.

In a suppression hearing, the State has the burden of demonstrating that the evidence it will offer against an accused was obtained in a constitutional manner. *State ex. rel. Rasmussen v. Tahash*, 272 Minn. 539, 141 N.W.2d 3 (1966). The State must show by preponderance of the evidence that the evidence it seeks to use was obtained in compliance with the constitution. *State v. Wajda*, 296 Minn. 245, 200 N.W.2d 1 (1973); *Lego v. Towney*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972). The court must make this determination based on the "record of evidence elecited at the time of the hearing." *State ex. rel. Rasmussen v.*

Tahash, 141 N.W.2d at 13.

In *State v. Mastrian*, 285 Minn. 51, 171 N.W.2d 695 (1969), Justice Rogosheske stated this principle in relation to arrests:

> Any arrest made without a warrant is presumtively invalid, and the burden in on the state to justify it as one not only authorized by §629.34 but also one not violative of the guarantee of the Fourth Amendment to the United States Constitution against any invasion of privacy except upon a showing of probable cause.

171 N.W.2d at 669.

The same standard applies to warrantless searches. Indeed, searches conducted without a warrant are *per se* unreasonable, subject to only a few well-delinated exceptions. *State v. Hanley*, 363 N.W.2d 735, (Minn. 1985). In *Welsh v. Wisconsin*, the Supreme Court reiterated this well established rule:

> Prior decision of this court, however, have emphasized that exceptions to the warrant requirement are few in number and carefully delineated," . . . and that *the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests*.

459 U.S. 1200 (1984) (emphasis added) (citations omitted).

The remedy for an illegal search and/or seizure is to suppress all evidence derived from it. *Dunaway v. New York*, 442 U.S. 200 (1979); Minn. Const. Art. I §10; *Minn. State*. §626.21 (1987) (this statute codifies the exclusionary rule in Minnesota and is often overlooked).

The fourth amendment and article I, section 10 forbid mere investigative seizures based on suspicion. An officer must have particular, objective facts that the driver or passenger of an automobile has committed a crime in order to stop the vehicle. *United States v. Cortez*, 449 U.S. 411 (1981); *State v. McKinley*, 305 Minn. 297, 232 N.W.2d 609 (1975); *see also, Olson v. Commissioner of Public Safety*, 371 N.W.2d 849 (Minn. 1985) and *Blaisdell v. Commissioner of*

Public Safety, 341 N.W.2d 849 (Minn. 1986) (no reasonable, articulable suspicion that a person has been, or is about to be engaged in criminal activity).

In this case, the State has failed to carry its heavy burden to show that the warrantless search of Mr. Schwartzman's bus did not violate his right to be free from unreasonable searches.

First the search by Gateley was not based on probable cause. (The State admits that much). Second, the State has failed to prove that Schwartzman freely and voluntarily consented to the search. Finally, the facts clearly show that a police officer, licensed by the state, ordered the search of Mr. Schwartzman's bus (and apparently many other person's vehicles). Therefore, the State's claim that Gateley's actions were "private" searches should be resoundingly rejected by the Court and all evidence derived from the search, including the statements and the evidence found on the defendants should be suppressed, lest our constitutional rights be lost by the mere assignment of police functions to "private" corporations.

1. *The Constitutional Probibitions Against Unreasonable Seizures Applied to North Security Personnel Because They Were Acting at the Direction of a Licensed Police Officer.*

In some circumstances, a "private" party may violate another's fourth amendment rights by conducting an unreasonable search. *United States v. Harvey*, 540 F.2d 1345 (8th Cir. 1976); *United States v. Walther*, 652 F.2d 788 (9th Cir. 1981) (reversing trial court and suppressing evidence seized by private employee who had worked in conjunction with law enforcement officials). Searches conducted by private parties must comply with the fourth amendment (and the Minnesota counterpart) when a government official in some manner instigates or encourages the search. *Gundlach v. Janing*, 401 F.Supp. 1089, aff'd. 536 F.2d 754 (8th Cir. 1976). *United States v. Issod*, 370 F.Supp. 1110 (E.D. Wisc. 1974) (search cannot be viewed as purely private action if it was encouraged or ordered by government officers). The factors which determine whether

a private person's search implicates the fourth amendment are whether the government knew of an acquiesced in the instrusive conduct and whether the purpose for conducting the search was to assist law enforcement efforts. *United States v. Feffer*, 831 F.2d 734 (7th Cir. 1987). The determination is made on a case-by-case basis. *Walther*, 652 F.2d 791.

In *Walther*, the Ninth Circuit suppressed evidence and held that a so-called private search by a common carrier, conducted with the intent to aid law enforcement authorities and with their knowledge, violated the fourth amendment. In *Walther* an airlines employee seized an overnight case. The employee opened the case and found some drugs. Then, the employee contacted agents from the Drug Enforcement Agency (DEA) who arrested the defendant.

In the past, the employee had conducted similar searches and had reported suspicious findings to the DEA. The prior contact with the DEA satisfied the court that the government acquiesced in the search. Further, the court found that employee intended to aid law enforcement by searching the overnight case. As a result, the court held the search unreasonable and suppressed the evidence.

In the present case, the police involvement was even greater than in *Walther*. The contact between police officer Emerson and Gateley was not merely incidental or short-term. The Ninth Circuit explained such a relationship is significant:

> The government must be involved directly as a participant or indirectly as an encourager of the private citizen's actions before we deem the citizen to be an instrument of the state.

652 F.2d at 791. In the present case, Emerson specifically directed Gateley to search every vehicle entering the gates of BIR. In fact, this type of practice was ordinary, everyday procedure. Officer Emerson told Gateley to look not only for suspected trespassers, but to search for contraband and illicit drugs as well.

This clearly goes beyond the parameters of a purely

private search. Moreover, it shifts the scope of the search from one designed to protect BIR's legitimate business needs to one that is designed to facilitate the law enforcement purposes of Brainerd and those of Crow Wing County.

Officer Emerson owns and controls North Country Security. More importantly, however, is the fact that he has been a licensed police officer for fourteen years. Furthermore, he is a special deputy for all of Crow Wing County. Emerson's so-called private actions cannot be divorced from his official position of authority as a law enforcement officer. As a police officer, Emerson cannot escape the proscription of the fourth amendment merely by directing a third party to perform a search or seizure which would be improper if he himself had conducted it. *United States v. West*, 453 F.2d 1351 (3rd Cir. 1972). The Court should not allow a police official to circumvent the fourth amendment under the operational guise of a private security force.

Gateley's actions implicated the fourth amendment. Gateley's employer is an official who derives his authority from the state. *See Minn. Stat.* §626.846. Emerson not only knew of and acquiesced in Gateley intrusive conduct but also condoned and encouraged it. Moreover, Gateley's purpose for conducting the search was intended to aid law enforcement purposes and was not justified by BIR's concern of finding non-paying spectators. Indeed, this search was explicitly carried out to assist law enforcement officials in their effort to secure criminal convictions. Therefore, Gateley's actions triggered fourth amendment protection.

The exclusion of the evidence in this case would deter police officers from setting up private, police organizations and conducting the widespread warrantless searches, not based on probable cause such as Emerson directed in this case. Thus, the deterent purpose of the exclusionary rule would be furthered by the suppression of the evidence.

Additionally, the Court should consider that even without direct governmental involvement, courts have recognized that an improper search by a security guard poses a serious threat to that privacy which is comparable to a threat posed

by the unlawful conduct of police officers. *See United States v. Dansberry*, 500 F.Supp. 140 (N.D.Ill. 1980); *People v. Holloway, 82 Mich. App. 629, 267 N.W.2d 454 (1978); Lowry v. State,* 707 P.2d 280 (Alaska App. 1985); *Commonwealth v. Leone*, 386 Mass. 329, 435 N.E.2d 1036 (1982).

In *Dansberry,* the court expressed its concern about such institutionalized searches:

> If private security guards are permitted to ignore fourth amendment proscriptions, reliance on private security personnel rather than law enforcement officials will be encouraged and unconstitutional searches will increase. Such a result in untenable.

500 F.Supp. at 145. For this reason, the application of the exclusionary rule can be expected to have a deterent effect on such unlawful search and seizure practices since private security personnel, unlike ordinary citizens, may regularly perform such quasi-law enforcement activities in the course of their employment. *People v. Zelinski*, 155 Cal. Rptr. 575, 594 P.2d 1000 (1979).

The legitimate threats to our notion of privacy wrought by the explosive increase in private security forces is convincingly demonstrated in the present case. Officer Gateley utiliized detention, the appearance of authority, and the psychologically coercive methods, rarely employed by anyone other than a law enforcement official. Further, Gateley's investigation into the bus went well beyond his employer's needs, which ultimately cannot be justified as incident to his private function for purposes of the fourth amendment. *Leone*, 435 N.E.2d at 1041.

Judge Kaufman, concurring in result in *People v. Holloway,* was very much on point as he stated poignantly:

> It is too simplistic to divide the world into public and private sectors and presume security guards to be on the private side. Security guards are hired to protect people and property, precisely the function given to other governmentally constituted peacekeeping forces . . . to err on the side of a restrictive interpretation of the Fourth Amendment would be to sanction the possibility

> of widespread abuse of the privacy rights of individuals by private security guards . . . ill-trained in the subtleties of the law of search and seizure, private security guards are more likely than public law-enforcement officials to conduct illegal search and seizures. In addition, private security guards have accoutrements of office that tend to radiate and air of authority not possessed by other private individuals. Of particular importance are the uniform and badge. Therefore, it seems truly myopic to suggest that although the tasks of private security guards and police officers are similar, although at least some security guards have the same arrest powers as do police officers, and although security guards' practical authority derives from trappings akin to those of public law enforcement officials, private security guards are nonetheless to be treated as any other private individual in terms of the Fourth Amendment. In reality, private security guards do act under "color of state law."

267 N.W.2d at 459-60 (emphasis in the original).

In the present case, North Country Security's investigations focus on the general public. This is not an organization primarily concerned with internal discipline in the business it represents. If North Country insists upon assuming the role of an organization whose purpose is to obtain criminal convictions, as its intensive searches suggest, then it should be treated as a "quasi-public" police force subject to the constitutional limitations in regard to search and seizure. This approach is not completely novel. *See Marsh v. Alabama*, 326 U.S. 501 (1946) (conduct of private entity exercising "public function" may be treated as state action).

The conduct of North Country Security in general, and that of Officer Gateley in particular, exceeded the bounds of purely private conduct. Therefore, this court must suppress the fruits of the illegal search.

2. *Officer Gateley was not Justified in Conducting a Warrantless Search Without the Consent of Both Defendants Schwartzman and Buswell.*

The Court should reject the state's contention that the defendants freely and voluntarily consented to the search of the bus. To justify a warrantless search on consent, the state must prove by clear and convincing evidence that the consent was freely and voluntarily given. *United States v. Parker,* 722 F.2d 179 (5th Cir. 1983) (*citing Bumper v. North Carolina,* 391 U.S. 543 in support of "clear and convincing" standard); *United States v. Rambo,* 789 F.2d 1289 (8th Cir. 1986) (State bears *heavy* burden in showing that consent was given freely and voluntarily). Voluntariness of consent is a finding a fact made the trial court after considering the totality of the circumstances. *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *State v. Schweich,* 414 N.W.2d 227 (Minn. App. 1987). Finally, if consent is involuntary, the consent and subsequent search are invalid. *State v. Snyder,* 375 N.W.2d 518 (Minn.)

In examining the surrounding circumstances, account must be taken of the coercive environment to which the defendants were subjected. As defendants' bus approached the gates to BIR, Schwartzman and co-defendant Buswell were confronted by Officer Gateley. Gateley was in the uniform of law enforcement official, complete with badge, holster and firearm. There were vehicles directly in front and directly in back of defendants' bus, making it virtually impossible for them to turn around and leave, if they *had* been given the choice. Gateley motioned the bus to halt. He then told defendants to step out of the bus. He stated that he wanted to search the bus for possible freeloaders. In reality, Gateley was looking not only for possible trespassers, but for illegal drugs and other contraband, pursuant to the instructions of his boss, Officer Emerson.

The State contends that defendants consented to Officer Gateley's search. However, mere acquienscence on the part of the defendants is clearly not a cognizable "voluntary" consent. It is not enough that one merely yields to color of police authority. *See Amos v. United States,* 255 U.S. 313

(1921); *State v. Armstrong,* 194 N.W.2d 293 (Minn. 1972); *State v. High,* 176 N.W.2d 637 (Minn. 1970). Furthermore, as the Eleventh Circuit has recognized, even when there has been a consent to search, it does not automatically cure or justify a prior (illegal) detention. *United States v. Miller,* 821 F.2d 546 (11th Cir. 1987) (reversing the denial of the defendant's motion to suppress and holding that the consent was the product of an unreasonable stop which was not sufficiently attentuated).

Scope of Search Exceeded Alleged Authorization

Even assuming arguendo that defendant Buswell did consent to the search, the search was defective because the scope of the search exceeded the alleged authorization. *See Walter v. United States,* 447 U.S. 649 (1980). A search that exceeds the authorized consent is unreasonable and violates the fourth amendment. *Schweich,* 414 N.W.2d at 230. A limited voluntary consent does not authorize "indiscriminate rummagings" into a person's possessions. *State v. Powell,* 357 N.W.2d 146 (Minn.Ct.App. 1984). In this case, a limited authorization to search for non-paying spectators, does not allow Gateley to search for contraband in places in which a person could not conceivably hide.

Mr. Schwartzman subjectively believed that he had no choice but to comply with Gateley's demand. North Country Security used coercive, albeit implicit, means to conduct its searches. These facts help demonstrate that Schwartzman did not freely and voluntarily consent to the search of his bus. Accordingly, the search was *per se* unreasonable and this court should suppress the evidence seized as a result of the illegal abuse.

CONCLUSION

Under the direct guidance and instigation of a state official, Gateley searched the defendants' bus. The search violated the fourth amendment to the United States Constitution and article I, section 10 of the Minnesota Constitution. The defendant did not freely and voluntarily consent to the search. Therefore, the court should 1) suppress

all the evidence derived from the search; 2) dismiss the complaint because the state's evidence is not sufficient to provide the probable cause necessary for this case to proceed to trial. *State v. Florence,* 239 N.W.2d 892 (Minn. 1976).

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Dated: October 26, 1988

No. 90-1098
No. 90-1099

In The
Supreme Court of the United States
October Term, 1990

STATE OF MINNESOTA,

Respondent,

vs.

JEFFREY SCOTT BUSWELL,
GARY LEE SCHWARTZMAN,

Petitioners.

Petition For A Writ Of Certiorari To The Supreme Court of Minnesota

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the search of petitioners' vehicle by private security personnel at the entrance to a private business, Brainerd International Raceway, was a private search not subject to limitation by the Fourth and Fourteenth Amendments to the United States Constitution?

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Petition For A Writ Of Certiorari To The Supreme Court of Minnesota

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petitions for writ of certiorari herein seeking review of the Minnesota Supreme Court's opinion in this case.

THE OPINION BELOW

Petitioners seek a writ of certiorari to review the judgment and opinion of the Supreme Court of Minnesota in *State v. Buswell*, 460 N.W.2d 614 (Minn. 1990), *reh. denied* (Minn. Oct. 8, 1990).

STATEMENT OF THE CASE

These are consolidated illegal drug cases in which petitioners, on March 9, 1989, were found guilty after a court trial of possession of controlled substances in violation of Minnesota law. The evidence upon which petitioners were convicted was developed as the result of a search of their vehicle by private security personnel at an entryway to Brainerd International Raceway (hereinafter "BIR") on or about August 18, 1988.

Unfortunately, in their petitions' respective statements of the case petitioners have chosen to ignore this Court's adjuration to present a "concise" statement containing only "the *facts* material to the consideration of the questions presented." U.S. Sup. Ct. Rule 14.1(g) (emphasis added). Pages 5-9 of both petitions go far beyond the facts and procedural history of the case to present purely argumentative material, complete with case citations. These pages contain no facts, but only conclusory assertions unsupported by any reference to the record.

Further, petitioners' statements of the case fail to mention certain important facts which the Minnesota Supreme Court found to be material. For example, nowhere do petitioners mention that BIR is a private business operating a racetrack on private property in Crow Wing County, about six miles outside the city limits of Brainerd, Minnesota (O.H. 12).[1] Nor do petitioners make clear that security for the raceway is provided by

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[1] "O.H." refers to the transcript of the consolidated omnibus hearing held on October 3, 1988.

means of a private contract between BIR and a private company called North Country Security owned by Keith Emerson (O.H. 12).

While petitioners do correctly state that Mr. Emerson is "a City of Brainerd police officer and a special deputy for the Crow Wing County Sheriff's Office." (Petitions at 5); they fail to point out the fact that his special deputy status gave Emerson no independent power to arrest outside the city limits of Brainerd except as directed by the Sheriff or a regular deputy (O.H. 35).[2]

The complete facts of this case show that BIR paid North Country a set figure for security on any given race weekend (O.H. 15). North Country's responsibility was to hire security guards and manage the security arrangements (O.H. 15-17). For this particular weekend approximately 127 guards were employed, only six or seven of which were police officers in any capacity, and none were from jurisdictions covering BIR (O.H. 23-25).

Prior to the racing season, in May 1988, Mr. Emerson had conferred in general terms with the Crow Wing County Sheriff and a local BCA agent as to what procedures would be employed if his security guards uncovered illegal activity (O.H. 26-27). But contrary to petitioners' characterization of this meeting, the record shows it was only agreed that if any incident encountered by BIR security guards seemed to warrant an arrest, the call would go first to Emerson who, after reviewing the

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[2] This particular fact was deemed important enough by the Minnesota Supreme Court to be mentioned twice in its opinion. *State v. Buswell*, 460 N.W.2d 614, 615 and 620 (Minn. 1990).

situation, would then decide whether to call in law enforcement (O.H. 28-29). Contrary to the assertion by petitioners (Petitions at 5), no agreement was made with either the Sheriff or BCA as to the type or number of searches conducted by BIR security personnel (O.H. 16, 17). Further, no law enforcement personnel were assigned to be present at BIR (O.H. 31-32, 116).

One responsibility of North Country Security at BIR was to search entering vehicles to insure that only ticket holders would enter the raceway (O.H. 19-22). This was done by stopping the vehicles about 50 feet from the main gate and entering the vehicles to look for any stowaways (O.H. 20-21).

On the morning of August 18, 1988, a number of vehicles were lined up to enter the gate when it opened. Numerous vehicles, including petitioners', were searched by security guards prior to entry. The primary reason for the search was to determine whether any unpaid persons were attempting to enter the raceway (O.H. 21-22, 75-76). Another reason was to keep illegal drugs, mopeds, and other prohibited items out of BIR (O.H. 77, 89-90).

The North Country Security guard who actually searched petitioners' vehicle was Bruce Gateley (O.H. 29). Mr. Gateley was not a licensed peace officer (O.H. 29), but on the day in question was wearing North Country's standard uniform and was carrying a sidearm and handcuffs (O.H. 22-23, 84).

When petitioners' vehicle approached Gateley motioned for them to stop in front of the BIR gate, informed the driver of the purpose of the search, and

then proceeded to search the inside of the vehicle (O.H. 75-79).

When Gateley discovered the controlled substances in question he informed Emerson, and law officers were notified (O.H. 29-30, 80). The officer who was eventually notified and responded to the call, Crow Wing County Deputy David Bjerga, was a long way from BIR property when he was asked to report to the raceway (O.H. 116). When Deputy Bjerga and other officers arrived, they were informed by security personnel that controlled substances were inside the vehicles (O.H. 117-120). Further investigation led to the arrest and conviction of petitioners.

A direct appeal was taken to the Minnesota Court of Appeals which reversed the drug convictions of petitioners and remanded for further proceedings. *State v. Buswell*, 449 N.W.2d 471 (Minn. Ct. App. 1989). The State petitioned for further review and on August 30, 1990, the Minnesota Supreme Court reversed the Court of Appeals and reinstated the judgments of conviction. *State v. Buswell*, 460 N.W.2d 614 (Minn. 1990).

REASONS FOR DENYING THE WRIT

I. INTRODUCTION

A writ in this case is neither necessary nor warranted because there exist no "special and important reasons" for the exercise of this Court's discretionary power of review. U.S. Sup. Ct. Rule 10.01. The Minnesota Supreme Court correctly held that the question presented herein is a fact specific issue "to be decided on a case-by-case basis

after consideration of all the facts and circumstances relative to the search." *State v. Buswell*, 460 N.W.2d 614, 618 (Minn. 1990). This was based on the recent decision by this Court in *Skinner v. Railway Executives Ass'n*, 489 U.S. 602, 614 (1989); a case which petitioners neglected to cite in their petitions.

Further, the basic parameters for determining when private searches are subject to the exclusionary rule have already been established by this Court in a long line of decisions extending from *Skinner* back through *Burdeau v. McDowell*, 256 U.S. 465 (1921). The Minnesota Supreme Court correctly applied these principles to the particular facts of this case. Far from being in conflict with the decisions of any federal circuit on this issue, the Minnesota Supreme Court expressly cited and incorporated the various decisions of the federal circuits into its own opinion. *Buswell*, 460 N.W.2d at 618-20. Accordingly, the petitions for writ herein can properly be denied.

II. NO SUBSTANTIAL FEDERAL QUESTION IS RAISED WHERE RESOLUTION OF THIS PRIVATE SEARCH CASE IS DEPENDENT UPON ITS OWN SINGULAR FACTS.

The factually unique nature of this case precludes it from presenting any substantial federal question as defined by this Court. As Justice Frankfurter wrote for the Court in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955):

> A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not

> sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. [Citations omitted]. *'Special and important reasons' imply a reach to a problem beyond the academic or the episodic.*

Id. at 74 (emphasis added).

The question presented herein is so based on the particular facts of this case as to be deemed merely "academic" or "episodic" in nature.

It has long been settled that the Fourth and Fourteenth Amendments are limitations only upon government activity, and that private searches, even unreasonable or arbitrary ones, are not unconstitutional. *Skinner*, 489 U.S. at 614; *United States v. Jacobsen*, 466 U.S. 109, 113-14 (1984); *Burdeau*, 256 U.S. at 475.

As to what constitutes a "private" search, this Court has already established in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) that:

> The test . . . is whether [the private citizen], in light of all the circumstances of the case, must be regarded as having acted as *an 'instrument' or agent of the state* when she provided her husband's belongings.

Id. at 487 (emphasis added). This determination "turns on the degree of the Government's participation in the private party's activities." *Skinner*, 489 U.S. at 614.

In each case, as the Minnesota Supreme Court herein properly recognized, the "question can *only* be resolved in light of all the circumstances.' " *Skinner*, 489 U.S. at 614 (quoting from *Coolidge v. New Hampshire*, 403 U.S. at 487) (emphasis added). *Accord United States v. Koenig*, 856 F.2d 843, 847 (7th Cir. 1988); *United States v. Feffer*, 831 F.2d

734, 739 (7th Cir. 1987); *United States v. Walther*, 652 F.2d 788, 791 (9th Cir. 1981). Thus, the question presented is a factually specific one which, by its nature, makes it difficult to establish detailed criteria that can be broadly applied.

Even the non-Fourth Amendment case cited by petitioners, *Evans v. Newton*, 382 U.S. 296 (1966) (Petitions at 6-7), recognized the factually specific quality of resolving when private conduct becomes so governmental in nature as to be subject to constitutional limitation. In *Evans* this Court made it clear that:

> [G]eneralizations do not decide concrete cases. *'Only by sifting facts and weighing circumstances'* [citation omitted] can we determine whether the reach of the Fourteenth Amendment extends to *a particular case*. The range of governmental activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions.

Id. at 299-300 (emphasis added).

In the present case the Minnesota Supreme Court carefully engaged in sifting the facts and weighing the circumstances to conclude that the trial court, as the initial and primary finder of fact, was not clearly erroneous in holding the search herein to be a private one. *Buswell*, 460 N.W.2d at 620-21. Because of the factually unique nature of this case, no new or broad principles are presented for this Court to review. Therefore, the writ should be denied for failure to present a substantial federal question.

III. THE MINNESOTA SUPREME COURT CORRECTLY APPLIED THE PRINCIPLES SET BY THIS COURT FOR DECIDING WHEN PRIVATE SEARCHES ARE SUBJECT TO THE FOURTH AND FOURTEENTH AMENDMENTS.

As already mentioned, the basic test established by this Court for invoking the constitutional limitations in question is whether the private individuals conducting the search were acting as agents or instrumentalities of the state in light of all the facts and circumstances of the case. *Skinner*, 489 U.S. at 614; *Coolidge*, 403 U.S. at 487. This test was correctly stated and applied by the Minnesota Supreme Court to the unique facts of this case. *Buswell*, 460 N.W.2d at 618.

The record herein amply supports the findings below that no state agent, acting in that capacity, in any way ordered or instigated the search in question. The search was entirely by BIR's private security personnel acting under a private contract between BIR and North Country Security. The idea of conducting vehicle searches at the gate was BIR's in furtherance of its legitimate private interests. The only governmental contact was a general meeting held between BIR security and the Sheriff's Department at the beginning of the racing season. Although general problems (regarding what to do when BIR security uncovered illegal activity) were discussed, no orders or directions were given by any law enforcement agency as to when, how or why BIR would conduct its gate searches (O.H. 16-17, 26-27).

The record further supports the findings below that Mr. Emerson was not acting as a peace officer in the conduct of his private security business. He has no police

jurisdiction while on BIR property (which was outside Brainerd's city limits); and the limited scope of Emerson's special deputy status meant that he could not arrest anyone at BIR under that authority (O.H. 35). All of Mr. Emerson's actions as head of security at BIR were simply those of a private citizen. *Cf. United States v. McGreevy*, 652 F.2d 849, 851 (9th Cir. 1981). *See also* 1 LaFave, *Search and Seizure* (2d ed.) § 1.8(d), p. 207, ("[A] person who is a law enforcement officer for a public agency may, under certain circumstances when he is not on duty, be deemed to have been a purely private search because he was not at that time performing a governmental function.")

Because the holding below was plainly correct and amply supported by the record, there is no basis for granting certiorari herein.

IV. THERE IS NO CONFLICT WITH ANY DECISION OF THE FEDERAL CIRCUITS.

Petitioners erroneously claim that the holding of the Minnesota Supreme Court herein conflicts with various decisions of the federal circuits (Petitions at 9-10). They specifically cite *United States v. Feffer*, 831 F.2d 734 (7th Cir. 1987); *United States v. Luciow*, 518 F.2d 298 (8th Cir. 1975); and *United States v. Walther*, 652 F.2d 788 (9th Cir.).

However, the Minnesota Supreme Court not only analyzed each of these federal circuit court opinions for the factors they considered, but it also expressly recognized and applied those criteria as being "helpful" to its decision. *Buswell*, 460 N.W.2d at 618. When it came to considering the arguments in this case the Minnesota Supreme Court said that:

> We examine these arguments *keeping in mind the two factor Walther test* and watching for clear indices of significant government involvement which would convert the conduct of the BIR security force into government action.

Buswell, 460 N.W.2d at 619 (emphasis added).

Clearly, the decision of the Minnesota Supreme Court does not conflict at all with any of the decisions of the federal circuits.

CONCLUSION

For all the above reasons, respondent respectfully asks that the petition for a writ of certiorari be denied.

Respectfully submitted,

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